(1) Supreme Court, U.S.
FILED
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No.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DOYLE WAYNE COX,
PETITIONER

V.

STATE OF TEXAS,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Supreme Court

---

PETITION FOR A WRIT OF CERTIORARI

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25 pp

QUESTIONS FOR REVIEW

I. THE COURT OF CRIMINAL APPEALS ERRED IN AFFIRMING THE LOWER COURT'S DENIAL OF PETITIONER'S MOTION NON OBSTANTE E VEREDICTO.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE LOWER COURT'S GUILTY VERDICT AFTER THE JURY FIRST ENTERED A VERDICT OF NOT GUILTY.

III. THE COURT OF APPEALS ERRED IN UPHOLDING PETITIONER'S CONVICTION FOR THE REASON THAT THE STATUTE UNDER WHICH PETITIONER WAS CONVICTED IS UNCONSTITUTIONAL.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the title of the case.

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CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, Art. I, Sec. 8, the "Commerce Clause".

RULES AND PROCEDURES

Tex. Penal Cod., Chapter 49, et. seq., including Tex. Penal Cod. §49.01 and §49.04 (1995).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below consist of a Judgment and Commitment, an Order denying Petitioner's Relief from the County Court at Law and the Court of Appeals; as well as the Sur Petition for Rehearing and the Judgement Order of the Criminal Court of Appeals affirming the decisions of the County Court at Law for Parker County,Texas.

JURISDICTION

Jurisdiction of the Court is found at Title 28 U.S.C. Section 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. I, Sec. 8, the "Commerce Clause".

STATEMENT OF THE CASE

Introduction

Appellant files this appeal from a lower court ruling finding Appellant guilty of Driving While Intoxicated. The Appellant was tried before the County Court at Law, Parker County, Texas, on November 19, 1993. At the conclusion of the trial, the Appellant was sentenced to 180 days in jail, fined $100.00 and court costs and suspended his drivers license for 12 months.

The court submitted the case to the jury. The jury upon returning the signed verdict to the judge entering a verdict of not guilty. The foreman of the jury indicated to the court that a mistake had been made and the court then requested the jury return to deliberation, after which time the jury returned a verdict of guilty.

The trial court denied Appellant's Motion Non Obstante Veredicto during which Appellant pointed out that no evidence of the prior convictions was entered in evidence. This was in conflict with the charging instrument. Appellant seeks a new trial based upon the errors made by the trial court.

Further, the Petitioner contends that the statute under which he was found guilty is unconstitutional on several grounds.

FACTUAL AND PROCEDURAL PREDICATE

Appellant files this appeal from a lower court ruling finding Appellant guilty of Driving While Intoxicated. The Appellant was tried before the County Court at Law, Parker County, Texas, on November 19, 1993. At the conclusion of the trial, the Appellant was sentenced to 180 days in jail, fined $100.00 and court costs and suspended his drivers license for 12 months.

The court submitted the case to the jury. The jury upon returning the signed verdict to the judge entering a verdict of not guilty. The foreman of the jury indicated to the court that a mistake had been made and the court then requested the jury return to deliberation, after which time the jury returned a verdict of guilty.

The trial court denied Appellant's Motion Non Obstante Veredicto during which Appellant pointed out that no evidence of the prior convictions was entered in evidence. This was in conflict with the charging instrument. Appellant seeks a new trial based upon the errors made by the trial court.

REASON FOR GRANTING THE WRIT

1. To aid the court in understanding the case distinctions and far reaching implications regarding the constitutional challenges.

1. THE COURT OF APPEALS ERRED IN AFFIRMING THE LOWER COURT'S DENIAL OF PETITIONER'S MOTION NON OBSTANTE VEREDICTO.

On the 26th of October, 1993, Defendant, **DOYLE WAYNE COX**, proceeded to trial for the offense of Driving While Intoxicated, Second Offense. (T.R.- Pg. 11;

S.F. Vol.II., Pg. 6). On October 27, 1993, the jury returned a verdict of not guilty on the record. (S.F. Vol. II., pg.142). The jury foreman then indicated and error had been made. (S.F. Vol. II, Pg. 143). The court then ordered the jury back into deliberation after which time the jury returned with a guilty verdict. (S.F. Vol. II, Pg. 143). Appellant's attorney asserted his objection indicating that such action would be double jeopardy. (S.F. Vol. II, Pg. 145). On November 19, 1993, the trial judge sentenced Appellant to 180 days in county jail, $100.00 fine, court costs and suspended his drivers license for 12 months. (S.F. Vol. III., Pg. 19).

The prosecution admitted it failed to read into the record the enhancement portion of the information which set out the charges against the Defendant. (S.F. Vol. III., Pg. 13). Further, it was admitted by appellee's attorney, on the record, that no evidence was entered by the state during the guilt/innocence phase of the trial nor at the punishment phase of the trial regarding any prior offenses of the Defendant. (S.F. Vol. III, Pg. 13). The charging instrument was never amended. (T.R.- Pg. 11).

Appellant asserts that the failure to prove all of the elements of the charging instrument is a failure of the Appellee's burden of proof. STATE VS. WHEELER, 790 S.W. 2d 415 (Tex. Civ. App.-Amarillo, 1990, no writ). It is essential to prove each element of the crime alleged. WHEELER, id. at 416. Failure to prove each element is jurisdictional and the verdict of the jury should stand. WHEELER, id. at 416.

Defendant's prior conviction was a jurisdictional element of the offense of Driving While Intoxicated, Second Offense and should have been presented to the jury. STATE VS. WHEELER, 790 S.W. 2d 415 (Tex.

Civ. App.- Amarillo, 1990, no writ); ADDINGTON VS. STATE, 730 S.W. 2d 788 (Tex. Civ. App.- Texarkana 1987, no writ). Therefore, that element was a proper part of the proof of the crime at the guilt-innocence stage of trail and such jurisdictional matters may not be waived. WHITE VS. STATE, 634 S.W. 2d 81 (Tex. Crim. App. 1982).

2. THE COURT OF APPEALS ERRED IN AFFIRMING THE LOWER COURT'S GUILTY VERDICT AFTER THE JURY FIRST ENTERED A VERDICT OF NOT GUILTY.

The jury entered a verdict on the record and signed the verdict sheet. (S.F. Vol. II, Pg. 143). Appellant asserts it was err for the trial court to have the jury return to deliberate after a finding of not guilty. The verdict of acquittal precludes reprosecution, even if no judgment to that effect is entered. UNITED STATES VS. BALL, 163 U.S. 662, 16 S. Ct. 1195 (1896).

The court accepted the verdict on the record. (S.F. Vol. II, Pg. 142). An acquittal includes the rulings of the trial judge, whatever its label, which actually represents a resolution of the case in Appellant's favor, regardless if it is correct or not. UNITED STATES VS. MARTIN LINEN SUPPLY CO., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977).

As shown, because the Appellee failed to prove all of the allegations in the charging instrument, it failed in its burden of proof. Further, because the elements of proof were jurisdictional, in that they were used to change the range of punishment of the crime, the verdict should be reversed and the Appellant discharged. Further, the original finding of the jury of not-guilty should also render the subsequent verdict void. Because of the trial court's

errors, the conviction should not stand.

3. THE COURT OF APPEALS ERRED IN UPHOLDING PETITIONER'S CONVICTION FOR THE REASON THAT THE STATUTE UNDER WHICH PETITIONER WAS CONVICTED IS UNCONSTITUTIONAL.

The statute, Tex. Penal Cod., chapter 49, et. seq., including Tex. Penal Cod. §49.01 and §49.04 (1995), is void for vagueness by reason of the fact that an ordinary person has no way of knowing his blood alcohol content of the breath. The jury charged asked the jury to determine the alcohol content of the breath of "his" breath.

Secondly, the portion of the judgment calling for a suspension of Petitioner's driver's license as it imposes cruel and unusual punishment. The courts have the right to control and restrain the legislature in extraordinary cases, where it becomes so manifestly violative of the constitutional inhibition as to shock the senses of mankind. TEXAS CENTRAL RAILROAD CO. VS. AHNNAY FRERICHS & CO., 104 Tex. 603, 142 S.W. 1163 (1912).

The D.W.I. Statute, Vernon's Civil Statutes Art. 6687 b, art. 24 (a), 1995, calling for automatic suspension of driver's license is a jurisdictional violation of the statute. The statute intends that the hearing office of the Department of Public Safety, judge of the municipal court or justice of the peace has exclusive jurisdiction regarding revocation of driver's licenses. The court in the case at bar took that jurisdiction away, without due process. Vernon's Civil Statutes Art. 6687 b, art. 22 (a), 1995.

Finally, the statute violates the U.S.

Constitution, Art. I, Sec. 8, the "Commerce Clause". In the case at bar, the Petitioner, a trucker involved in interstate commerce, will be prohibited from conducting the business and livelihood of driving a truck. (S.F. VOL.II, PG. 59). The power regulating this form of commerce is reserved to the federal government and cannot be infringed upon by the individual states which interrupts the free flow of commerce. RAYMOND MOTOR TRANSPORTATION, INC. V. RICE, 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed. 2d 664 (1978). The Petitioner asserts that the current D.W.I. statute hinders interstate trade by imposing regulations which are non-uniform nationally.

CONCLUSION

For all the reasons states above, Petitioner respectfully urges this Court to grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

No. 2-93-507-CR

COURT OF APPEALS
SECOND COURT OF APPEALS DISTRICT OF TEXAS
FORT WORTH

DOYLE WAYNE COX	§	FROM THE COUNTY
	§	AT LAW OF PARKER
VS.	§	APRIL 20, 1995
	§	OPINION BY JUSTICE
	§	LIVINGSTON
THE STATE OF TEXAS	§	(NFP)

JUDGMENT

This Court has considered the record on appeal in this case and is of the opinion that there was no error in the judgment of the trial court.

It is the order of this Court that the judgment of the trial court is affirmed and that the appellant pay all costs of the appeal.

APPENDIX B

No. 2-93-507-CR

COURT OF APPEALS
SECOND COURT OF APPEALS DISTRICT OF TEXAS
FORT WORTH

DOYLE WAYNE COX	§	FROM THE COUNTY
	§	AT LAW OF PARKER
VS.	§	APRIL 20, 1995
	§	OPINION BY JUSTICE
	§	LIVINGSTON
THE STATE OF TEXAS	§	(NFP)

OPINION

Doyle Wayne Cox ("appellant") was charged with the misdemeanor offense of Driving While Intoxicated, second offense, and the jury returned a guilty verdict. The court found the State failed to prove the allegations of the enhancement paragraph of the information and assessed appellant's punishment under the provisions for a first offense. Appellant was sentenced to 180 days in jail and a $100 fine. In two points of error, appellant complains the lower court erred by: 1) denying appellant's motion for judgment non obstante veredicto; and 2) allowing the jury to retire for further deliberations after the foreman indicated the verdict was incorrect as read. We affirm because the trial court correctly denied the motion for judgment non obstante veredicto and properly ordered further jury deliberations.

In his first point of error, Appellant argues the trial court should have granted Appellant's motion for judgment non obstante veredicto because the prior

conviction was a jurisdictional element of the offense of driving while intoxicated and should have been presented to the jury during the guilt/innocence phase of trial. Although the State read the information to the jury at the beginning of the guilt/innocence phase of the trial, the State did not read the enhancement portion of the information into the record. The State admitted that it also failed to offer any proof of the prior conviction alleged in the enhancement paragraph during the punishment phase of trial. No evidence of the prior conviction was presented during either the guilt/innocence or the punishment phase of trial.

Both first and second offense driving while intoxicated are misdemeanors.

Because both offenses were misdemeanors, the county court at law had jurisdiction over both offenses. See TEX. GOV'T CODE ANN.

Currently, section 49.04 of the Texas Penal Code classifies first offense driving while intoxicated as a class B misdemeanor and section 49.09(a) of the Texas Penal Code classifies second offense driving while intoxicated as a class A misdemeanor. TEX. PENAL CODE ANN. §§49.04, 49.09(a) (Vernon 1994). These provisions became effective September 1, 1994, after appellant's conviction. Therefore, we look at the predecessor statute which was codified as Texas Revised Civil Statute article 6701-1. Act of May 17, 1983, 68th Leg., R.S. ch. 303, § 3, 1983 Tex. Gen. Laws 1658, 1581, repealed by Act of May 29, 1993, 73rd Leg. R.S., sc. 900, §1.15, 1993 Tex. Gen. Laws 3586, 3704.

(continued...)

§26.045(a) (Vernon Supp. 1995); Love v. State, 833 S.W. 2d 264, 266 (Tex. App--Austin 1992, pet.ref'd). Therefore, it was not necessary to prove appellant's previous offense to invoke the jurisdiction of the county court at law.

Where a prior conviction is not necessary to sustain the trial court's jurisdiction, the prior conviction is only used for enhancement of the punishment. Article 36.01 of the Texas Code of Criminal Procedure provides that [w]hen prior convictions or information reciting such convictions shall not be read until the hearing on punishment is held. . ." TEX CODE CRIM. PROC. ANN. art. 36.01(a)(1) (Vernon Supp. 1995) (emphasis added).

As provided in article 36.01, the enhancement paragraph was not read during the guilt/innocence phase of trial. Further, the trial judge, at the punishment

---

(...continued)

Former article 6701/-1(b) made driving while intoxicated an offense. Under article 6701/-1(c), a first time offense was punishable with a fine of not less than $100 or more than $2000 and confinement in jail of not less than 72 hours or more than two years. Article 6701-1/-1(d) provided punishment of a second offense of a fine of not less than $300 or more than $2000 and confinement in jail of not less than 15 days or more than two years. Under section 12.41 of the penal code, both of these offenses would be Class B misdemeanors because jail time was affixed to the offense a possible punishment. See TEX. PENAL CODE ANN. § 12.4(1) (Vernon 1994).

hearing determined that the State failed to prove the enhancement paragraph and applied the first offense driving while intoxicated sentencing guidelines while assessing punishment. Because the prior conviction was not jurisdictional and therefore, not admissible during the guilt/innocence phase of trial, the trial court did not err by denying appellant's motion for judgment non obstante verdicto. Appellant's first point of error is overruled.

In his second point of error, appellant argues the trial court erred when it instructed the jury to retire for further deliberation after the presiding juror indicated to the court that there was a problem with the verdict. The following scenario is the basis of appellant's complaint"

> THE COURT: Is the verdict that has been returned to the court the unanimous decision of the jury?
>
> (JURY FOREMAN): It was a difficult one, Your Honor, but we did reach a unanimous decision.
>
> THE COURT: Okay, I will read the verdict of the jury now. "We, the jury, find the defendant, Doyle Wayne Cox, not guilty." Signed Joe Pat Measures, foreman of the jury.
>
> Is there anyone that requires a polling of the jury?
>
> (JURY FOREMAN): Your Honor, Your Honor.
>
> THE COURT: Yes?
>
> (JURY FOREMAN): That is a gross mistake on my part. I take full responsibility for that. I signed it on the wrong line. If you wish to see

the ballots that we cast, we have them in there.

THE COURT: No. What I'm going to do is, if I understand, this is not the decision of the jury. I'm going to send you back to the jury room.

(JURY FOREMAN): That is a gross mistake.

THE COURT: Okay.

(JURY FOREMAN): How could that-- we all sat right there at the table, passed it around and looked at it and then signed it on the wrong line. I've been fired.

THE COURT: I'll send y'all back in to return a verdict form reflecting your verdict.

When the jury returned the second time, the court read the verdict, "guilty as charged," polled the jury, and certified the"guilty" verdict to be a unanimous decision.

The Texas Court of Criminal Appeals addressed a fact situation very similar to the case before us in Jones v. State, 511 S.W. 2d 514 (Tex. Crim. App. 1074). IN Jones, appellant was being tried for two separate crimes in the same trial which resulted in to separate verdict forms being submitted to the jury. Id. at 515. When the jury returned, the jury foreman indicated that the verdict was unanimous, and the court read the verdicts showing "not guilty" in the murder case and "not guilty" in the assault with intent to murder case. Id.

Apparently, the results of the polling by the court on the verdicts raised a

question regarding the accuracy of the verdict because the judge began questioning the jury foreman.

> THE COURT: . . . This is Cause No. 7130 wherein the charge is murder and the verdict that you signed on the form that you signed reads as follows: "We, the jury, find the defendant not guilty." Is that your verdict in the murder case?
>
> THE FOREMAN: No.
>
> THE COURT: As I understand it then, what you are telling me, you have a unanimous verdict but that is not it.
>
> Am I correct in assuming the verdict that I read in the other case is unanimous as is correctly read?"
>
> THE FOREMAN: Exactly.

Id. at 516. The judge instructed the jury to retire to the jury room and asked the foreman to poll the jury and enter the correct verdict on the form. When the jury returned, a verdict of guilty was entered.

The court of criminal appeals held that where the jury foreman dissented to the verdict as read and indicated that a mistake had been made, "[t}he court properly requested further deliberations by the jury and received and placed upon the minutes of the court the true decision of the jury." Id. at 516-17.

This course of action is also supported by the Texas Code of Criminal Procedure.

The actual hand counts on the polling are not provided in the opinion.

The Texas Code of Criminal Procedure provides:

> When the jury agrees upon a verdict, it shall be brought into court by the proper officer; and if it states that it has agreed, the verdict shall be read aloud by the judge, the foreman, or the clerk. If in proper form and no juror dissents therefrom, and neither party requests a poll of the jury, the verdict shall be entered upon the minutes of the court.

TEX. CODE CRIM. PROC. ANN. art. 37.04 (vernon 1981) (emphasis added). The code further explains that where the jury is polled and one of the jurors answers in the negative, "the jury shall retire again to consider its verdict." TEX. CODE CRIm. PROC. ANN. art 37.05 (Vernon 1981). The trial court's quick actions in assessing the situation and asking the jury to retire for further deliberations to straighten out the confusion were the proper method for dealing with this unusual situation.

Accordingly, appellant's second point of error is overruled.

The judgment of the trial court is affirmed.

TERRIE LIVINGSTON
JUSTICE

PANEL A
CAYCE, C.J.; LIVINGSTON, J. and
Ron Carr, J. (Retired)(Sitting by Assignment)

DO NOT PUBLISH
Tex. R. App.P. 90(c)
Apr 02 1995

APPENDIX B

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS
SEPTEMBER 20, 1995
COA 02-03-00507-CR
RE: CASE NO. 0814-95
STYLE: COX, DOYLE WAYNE

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

APPENDIX C

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

November 8, 1995

COA#02-93-00507-CR

RE: Case No. 0814-95

STYLE: COX, DOYLE WAYNE

On this day the Appellant's Motion for Rehearing was denied.